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No. 90-1979

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Supreme Court of the United States

OCTOBER TERM, 1990

CITY OF SANTA ANA,
Cross-Petitioner,
vs.
JESSE J. SANCHEZ,
Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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CROSS-RESPONDENT'S STATEMENT OF THE CASE

A. Jurisdictional Statement

Plaintiff-appellee Jesse Sanchez claimed a due process violation in the removal of his merit pay [ER 10, 26], alleging emotional distress damages [ER 12], "a medically diagnosed stress reaction" [ER 11, 28], "work related disability" [ER 28], and "constructive discharge" while suffering a work-related disability [ER 26-27].

Santa Ana City Charter sec.1008 establishes that dismissal, suspension or demotion may occur only for specified forms of misconduct, and provides the due process to be followed in such cases. [Appendix Q]. Prior to June 1978, sec.1008 provided that "[a] reduction in pay shall be treated as a demotion under this section . . . ." [Appendix Q] [Exs 44:2; ER 909]. In the June 1978 city election, well after Sanchez

received his merit steps "D and "E", the charter was amended to add to the latter language in sec.1008 the further exception: "unless . . . the employee's performance does not justify the continuance of a level of pay that is dependent upon meritorious service." [Appendix R] [ER 941-42].

In the Joint Pretrial Conference Order filed June 21, 1982, the City stipulated to the following phrasing of Sanchez' due process claim: "whether defendants denied Sanchez procedural due process by following City Charter sec.1008, as amended in June 1978, when he was reduced from Salary Step E to Salary Step C in March 1979." [CR 116; ER 71-72, 120-21].

In a Motion for a Declaration of Law in Limine, filed August 2, 1982, defendants collectively asserted the constitutionality of Charter sec.1008, as amended in June 1978 [CR 122]. On February 7, 1983, the

City filed a Motion for Early Determination of Certain in Limine Issues, one of which sought a declaration of law that sec.1008, as amended in June 1978, is constitutional [CR 125].

Sanchez opposed this motion [CR 126] and made a counter motion for partial summary judgment -- i.e. that defendants City and Chief Davis had denied Sanchez due process of law in the successive deprivations of his Merit Steps "E" and "D", supported by stipulations of fact in the Pre-Trial Order and numerous documentary exhibits [CR 127-32, 147; ER 900-38, 949-50]. In responding to Sanchez' motion, the City and Davis offered no evidence or declarations, did not contend that there was any genuine issue of material fact, did not object to any of Sanchez' evidence in his motion, and did not assert good faith qualified immunity on

behalf of Chief Davis. [CR 149; ER 939-48]. Defendants confined their opposition solely to the argument that sec.1008 as amended in June 1978 is constitutional on its face and as applied retroactively to employees with merit pay steps which vested while the predecessor section was in force. [CR 149; ER 939-48].

On April 8, 1983 the district court issued an order, noting that defendants apparently did not understand that plaintiff had made a summary judgment motion, and affording the City and Davis an opportunity to further brief their opposition "includ[ing] admissible evidence" [ER 952-53](emphasis added).

Offered a second chance, defendants then argued that Sanchez was informed of his right to an "administrative appeal" via the grievance procedure and that that satisfied any due process requirement.

[CR 155.2]. Defendants offered no declarations, relying instead solely on several memorandums which plaintiff had already submitted in his motion. [CR 155.7-15]. The only grievance procedure identified by defendants in their memorandums to Sanchez, and in defendants' supplemental opposition, was "Section 10.77 of the SAPD Rules & Regs." [CR 155.15]. The latter expressly provided that the final decision under this procedure was with the chief of police, not the city manager. [Ex 66; CR 158].

Defendants again failed to contend at any point that there were any genuine issues of material fact. [CR 155]. Instead, defendants continued to argue that they were entitled to judgment as a matter of law because they had provided an administrative appeal via the grievance procedure and because "Sanchez was not

denied constitutional procedural due process by the retroactive application of amended City Charter section 1008, because he had no 'vested' right to the pre-amendment procedures and the procedure under the amended section 1008 was constitutionally valid." [CR 155.5-6]. Chief Davis again did not assert qualified immunity. [CR 155, 158; ER 955-63].

On June 3, 1983, the district court entered partial summary judgment on Sanchez' due process claim, reserving for trial the scope of damages [ER 362-63], and made findings of fact and conclusions of law [ER 364-67].

At the liability phase of trial on plaintiffs' remaining claims, the City and Davis moved orally for reconsideration of the summary judgment based on "new evidence" -- the sworn testimony at trial of Chief Davis and others that under some

unwritten city-wide grievance procedure which he could not identify or produce, Sanchez could have grieved the matter to the City Manager [Tr 4026-41]. The district court refused to reconsider, declaring that it had reviewed the matter at great length, that defendants had plenty of time to have done so earlier, and that the City had had access to Davis and his position at the time of the previous motion when the City had three (3) opportunities to brief the matter [Tr 4041-44].

On June 18, 1985, the district court directed a verdict on all remaining plaintiffs' claims [CR 585]. On June 28, 1985, with the jury yet to be discharged and the damage phase of the partial summary judgment remaining to be tried, the City and Chief Davis again moved for reconsideration of the partial summary judgment, again relying on the "new

evidence" at trial of an unwritten city-wide procedure permitting appeal to the city manager, and asserting qualified immunity for Chief Davis for the first time. [CR 587-89; ER 968-1014]. For the first time, defendants asserted the "waiver" argument. [ER 968-1014].

In making this motion, defendants still did not contend that this evidence established any genuine issue of material fact. Instead, in concluding, defendants urged once again that they were entitled to judgment as a matter of law. Defendants offered no explanation for their failure to produce this evidence earlier when afforded multiple opportunities to do so in connection with the summary judgment motion.

In none of the aforementioned briefings or motions did defendants even remotely suggest that there was any

question but that the retroactive application of amended sec.1008 was pursuant to an official policy to do so. Indeed, defendants repeatedly requested the district court to rule that this policy was constitutional as a matter of undisputed fact and law.

On September 17, 1985, the district court denied the City motion to reconsider the partial summary judgment, finding that it was not a proper motion to reconsider, and that in any event even if Sanchez had recourse to the City Manager, notwithstanding the clear record to the contrary, "there is no sufficient showing that plaintiff had notice that such an appeal was available." [ER 427-28]; further, it granted Chief Davis' motion for reconsideration, declaring that the "actions taken by defendant Davis cannot be reasonably found to be in violation of

clearly established law" entitling him to immunity, but not elaborating further [ER 428].

At no time during the damage phase of the jury trial did the City move orally or in writing, explicitly or in substance, for directed verdict on the sufficiency of the evidence, or on any issue, directly or indirectly, litigated during that damage phase. Judgment on the jury verdicts, finding a constructive discharge and awarding $400,000. for lost back and future pay, plus interest and benefits, and $500,000. for emotional injury and distress, was entered November 1, 1985 [CR 640, 641].

On November 22, 1985, the City made timely motions for JNOV and new trial including an unspecified attack on the sufficiency of the evidence and other arguments never raised in a directed

verdict motion, nor otherwise properly preserved in the record [ER 1073-1102]. On February 21 & 28, 1986, the City belatedly attempted to assert that Sanchez' due process claims were barred because of the adequacy of existing state post-deprivation remedies, mischaracterizing the motion as a "Request for Determination re Lack of Jurisdiction" to sidestep their failure to timely raise the issue.

Sanchez preserved his objections to the City improperly raising these matters by post-trial motion [CR 706, 711]; and objected to the untimely raising of a matter not preserved for trial in the Pretrial Order [CR 116] or the Amended Pretrial Order [CR 368], nor even included in the post-trial motions, by falsely characterizing it as a matter of a "lack of jurisdiction" [CR 757:1-6].

On May 30, 1986, the district court

rejected the asserted lack of jurisdiction, noting that the adequacy of state remedies does not preclude a federal claim when the claimed denial of due process did not arise from a "procedurally random and unauthorized deprivation"; where the "deprivation arose . . . from the failure of the City, through its enacted procedures and regulations, to provide plaintiff with a right to appeal"; where "it is clear to the Court that even if there was a right of appeal to the City Manager, plaintiff was never made aware of this right"; where "it would have been practicable for the City to provide procedurally adequate process"; where "some established state procedure" or "the state system itself . . . causes the deprivation [ER 433-35]; further, that the City's attempted distinction between state and municipal officials is not supported by any authority, and that there is clear

contrary authority [ER 435].

The district court denied the motion for JNOV because the "[damages] trial . . . did not produce any evidence or theory which gives this Court any reason to now declare that the City is not liable . . . ." [ER 435-36] and because, as to the Carey defense that Sanchez' merit pay would have been removed even if he had been afforded due process, the "Court finds that the City failed to rebut the evidence of lost wages . . . and that there was sufficient evidence to justify the $400,000. award [ER 436].

The district court denied the motion for new trial, finding that defendants had utterly failed to produce any evidence at all and that "the City failed to meets its burden, and it should not be given another opportunity to mount a better defense through the granting of a new trial

[ER 436-37]. Final judgment was entered July 23, 1986 [ER 448-51] and Notice of Appeal was filed August 19, 1986 [CR 794; ER 454-55].

B. Cross-Respondent's Statement of Facts

Sanchez was hired by SAPD on September 16, 1975 as a police officer at salary step C, and progressed to merit salary step (two steps) by April 1, 1978 [ER 51]. On February 28, 1979, Sanchez' Sgt. Collins signed and submitted to Sanchez his annual performance rating, which declared "does not justify retention at a merit level" [Ex 415; ER 701-03]. On March 14, 1979, Commander Hansen, in a memorandum entitled "Recommended Disciplinary Action", recommended to Chief Davis that certain disciplinary actions against Sanchez be concluded with a loss of merit step "D" instead of suspension. [Ex 47; ER 52, 910-11].

On March 15, 1979, Sanchez left roll call, claiming emotional illness [Ex 52; ER 913-17]; later, the same date, Sanchez' merit step "E" was formally removed, retroactive to March 1, 1979 [Ex 46; ER 52, 909]. On March 20, 1979, Hansen revised his March 14, 1979 recommendation to Davis to read "Recommended Administrative Action" in lieu of "Recommended Disciplinary Action." [Exs 47, 48; ER 910-12]. The reduction of Sanchez' merit pay to step "C" was then approved by Chief Davis on March 26, 1979 [Ex 48; ER 912], effective April 1, 1979 [ER 52].

On March 30, 1979, in a memorandum addressed to Chief Davis and copied to Hansen and Stebbins, Sanchez made a timely, written demand for a written statement of charges, seeking to initiate the administrative appeal provisions of Charter sec.1008. [Ex 243; ER 920-23].

On April 4, 1979, Hansen invoked the City policy as reflected in the June 1978 amendment to sec.1008, informing Sanchez that removal of his merit pay was not based on any specific charges other than failure to perform at a level justifying merit pay, that no further disciplinary proceedings were pending against him, and that any appeal would be pursuant to the grievance procedure, orally or in writing, to Chief Davis [Ex 244; ER 924-25].

On April 13, 1979, Sanchez reiterated his efforts to initiate his right to administrative appeal via sec.1008. [Ex 246; ER 927]. On April 17, 1979, Hansen informed Sanchez again that removal of merit pay was predicated solely upon nonmeritorious service, and that Sanchez' only entitlement was to either request an interview with, or submit a written grievance to, Chief Davis [Ex 247;

ER 928]. On April 25, 1979, Sanchez was further informed by defendants that "sec.10.77 of the SAPD Rules & Regs. covers Grievance Procedure" [Ex 248a; ER 929].

Loss of the two (2) merit pay steps, on March 1, 1979 and April 1, 1979, respectively, resulted in a net reduction in Sanchez' monthly pay in the amount of $159. -- i.e. 10.25% of Sanchez' base pay [CR 125:11; ER 905]. Sanchez was entitled to reconsideration for reinstatement of one or both merit steps after six (6) months [Ex 247; ER 928]. On September 10, 1979, the City refused to reconsider restoration of Sanchez' merit pay step E as provided in the merit pay ordinance, though six (6) months had elapsed since removal of merit pay step. [Ex 55:11; ER 53].

Notwithstanding the mandatory timelines in the SAPD Grievance Procedure [Ex 66:26; ER 967], Chief Davis never

responded to Sanchez' written grievances of March 30, 1979 or April 13, 1979, addressed to Chief Davis, and complaining about the procedures and the criteria employed to remove his merit pay [ER 905].

Until June 30, 1979, the SAPD Grievance Procedure on its face provided for no appeal beyond the final decision of Chief Davis, a fact conceded by Chief Davis after he testified about the "unwritten city-wide grievance procedure" [Ex 66:26; ER 967[1]; RT 4082-84[2]]. The Memorandums of

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[1]. The Grievance Procedure provides, in its final three steps:

"f. A conference shall be held to discuss the grievance, at the request of the employee, the Chief of Police or the City Manager.

"g. The Chief of Police shall inform the employee of his action within 10 days after receipt of the request of the settlement.

"h. The original of the grievance form and the Chief's decision shall be filed in the Personnel Records of the Department."

Understanding [MOU] between the Police Association and the City did not address this question prior to June 30, 1979 [Exs 612, 613]. Effective June 30, 1979, the MOU's modified the grievance procedure to provide expressly for formal review, with written findings, by the City Manager [Exs 74a:31-33, 74b:31-33].

Sanchez did invoke the grievance procedure in two memorandums to Chief Davis on March 30, 1979, complaining about Collins' handling of two pending disciplines and the removal of his merit pay, one step having been retroactive,

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[2]. Chief Davis' testimony at trial:

"Q. Where in that grievance review procedure would you say is an indication to police department employees that the matter can be submitted to the City Manager after you have made your decision for a consideration . . . by the City Manager?

"A. I don't believe I have ever testified that." [RT 4082-83].

without affording him any opportunity to rebut the charges [Exs 243, 419; ER 920-23; RT 3946-49, 4053-56], and reiterated the substance of his grievance on April 13, 1979 [Ex 246; ER 927]. Chief Davis testified that "under normal circumstances" Sanchez' grievance should have received some response from him [RT 3950], since the grievance procedure mandates a response from him [RT 2950-51, 2983-84, 3943-44]. Davis never responded to any of these memorandums [RT 4062-68, 4124-27].

The following evidence was presented at the damage phase trial without being controverted by any evidence from the City.

The district court admitted into evidence the Findings of the Workers' Compensation Appeals Board, which had been based on the consensus of several psychiatric evaluations, including one who was retained by the City to evaluate

Sanchez [Ex 52; RT 9112, 9121-24], that: (1) Sanchez sustained an injury arising out of employment for the period 1977 to May 6, 1977, while employed as a police officer, consisting of an emotional disability [RT 9121]; (2) this injury caused temporary total disability from March 15, 1979, through April 7, 1979, and again from May 6, 1979, through January 10, 1980 [RT 9122, 9124]; and (3) Sanchez was in need of further medical care as of the date of said findings [RT 9123].

Dr. Robert Maurice, M.D. treated Sanchez from March 28, 1979, through August 1979, seeing him five times, due to episodes of anxiety [RT 9115-17, 9120]. He relied, in his testimony, on the reports of the examinations and opinions of Dr. Samuel Pilchman, 1/9/80[3], and Dr. Louis L.

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[3]. This expert was retained by the City.

Lunsky, 10/2/79 and 10/6/79, both of whom observed a serious stress reaction and concluded that Sanchez was in need of further medical care [RT 9123]. Dr. Maurice, who treated Sanchez during the period when his merit pay was being removed, testified that Sanchez, who was then on leave, was having anxiety attacks directly related to stress in employment -- i.e. a sudden onset of fear, often sweating, tremulousness and extreme fear -- which was worsening [RT 9115-17].

On June 21, 1979, Sanchez first complained of episodes of feeling "unreal" and voiced worries he might be losing his mind [RT 9128-29]. Dr. Maurice diagnosed this as "depersonalization" [RT 9129], explaining that this occurs when a person is under more stress than he can handle and is a way of distancing one's self from severe stress [RT 9119]. This

"depersonalization" indicated that the stress was getting worse [RT 9129].

On August 20, 1979, Dr. Maurice concluded that the anxiety attacks that Sanchez was having at that time disabled him from returning to SAPD [RT 9120-21], and wrote a letter suggesting so [Ex 75:1; RT 9120, 9133-35]. Dr. Maurice's letter, dated August 30, 1979, concluded that plaintiff Sanchez was able to resume employment "providing that the psychological stresses he encountered before are absent or eliminated" [RT 9135 (emphasis added)].

Dr. Maurice, asked to assume the truth of facts established by the district court's earlier summary judgment findings and conclusions [RT 9108-11], gave the opinion that each of those facts would tend to successively aggravate Sanchez's condition [RT 9126-27]. In explaining why

these successive events would cause progressive aggravation, Dr. Maurice stated that the failure of SAPD to provide an opportunity to answer the charges that led to the merit pay reduction "most certainly" served as an impediment to Sanchez' being able to work at SAPD with his mental health intact [RT 9139-40].

Dr. Louis L. Lunsky, M.D. examined Sanchez on October 2 & 6, 1979, and reviewed Sanchez' personnel file [RT 9144], records from Dr. Sanders, Dr. Maurice, and psychologist Alice Pittman [RT 9146], and medical records of Dr. Robert Galak, a treating psychiatrist for Sanchez from 4/9/84 to 4/1/85 [RT 9145; 9156-57]. Dr Lunsky concluded that as of October, 1979, shortly after Sanchez resigned, he had a mixed neurosis, depressive type [RT 9146], with intrusive symptoms of anxiety and depression which interfere with the ability

to work, with personal experiences, and with day to day activity [RT 9146-47].

Dr. Lunsky also saw evidence of marked depersonalization in Sanchez in October, 1979 [RT 9154], with signs of significant anxiety [RT 9153- 9154]. In Dr. Lunsky's opinion, Sanchez had a severe anxiety attack on March 15, 1979 [RT 9147] and his condition on March 15, 1979 was the same condition presented to Dr. Lunsky in October 1979, and had continued throughout that time frame [RT 9148]. Dr. Lunsky also expressed the opinion that the "assumed facts" [RT 9148-49] established by the district court's findings -- i.e. denial of due process -- played a very significant role in Sanchez' illness [RT 9149] and that reduction from Merit Step "E" to "C" would have an erosive effect on his self-esteem and self-worth, a symptom which he observed directly in October 1979 [RT 9152].

Sanchez testified that he first suffered anxiety attack in roll call, at 7:00 A.M. on March 15, 1979; felt disassociated and surge of anger, and thought about shooting an officer who had moved away from him when he sat down; he became scared by these thoughts and felt dizzy, and thought he would pass out; felt pain in his back, and could not breath; feared losing control and wanted to run from roll call. [RT 9195-98].

When he left work, he believed he was at "E" step, with only his previous sergeant's recommendation for loss of the "E" step, and his assurances he would have a chance to respond before a decision was made [RT 9200]. Sanchez first learned of decision to remove his "E" step on March 20, 1979, when he picked up his check covering the first two weeks in March [RT 9201]. When he picked up his next

paycheck, he learned of the removal of his "D" step; he never received any notice of the removal of either step from Chief Davis or Commander Hansen, nor any notice as to the "D" step at all [RT 9202-03]. He attempted to learn reasons for removal of his merit pay, and sought a hearing, but never received any specific statement of charges [RT 9203-06, 9224-26, 9229].

When he learned of the step "E" removal, he felt anger and that there was no solution; with the step "D", he felt anger, anxiety and fear, thinking: "These guys were just putting the final nails in my coffin as far as my police career was concerned," especially since he had been out on leave while it happened [RT 9207-08, 9221-22]. When he could not obtain any specific statement of charges or hearing he was frustrated because he felt there was no recourse; that he was being charged with

many things, but could not defend himself; he felt that Hansen was taunting him in his responses. [RT 9225-26].

When he was considering going back in September 1979, he "was terrified at that police department." [RT 9236]. On his return, Sanchez was placed on graveyard shift -- an informal means of punishment for someone previously on day shift -- under a Lt. Salazar, who had just completed an investigation of Sanchez' earlier discrimination complaints, which had resulted in Sanchez being disciplined for going outside the chain of command to the City's Affirmative Action Officer. [Exs 71-72; RT 9241].

Sanchez objected to this assignment. He also wrote to Chief Davis, requesting reinstatement of his merit pay given that the six (6) month reconsideration period had passed, and asked that Chief Davis

respond [Ex 55:11; RT 9241-44]. He never received any response from anyone [Ex 55; RT 9244-45]. Following this latest refusal to respond, Sanchez resigned, concluding that he would ever get a fair hearing, would continue to be subjected to the harassment which led to his merit pay removal, would never be provided any kind of meaningful or fair hearing by the City, and that his mental health was seriously at jeopardy. [Ex 55:161-62; RT 9246-50].

The City offered a summary of all merit pay removals in the SAPD from 1978-85, with "employee #2" stipulated to be Sanchez [Ex 142; RT 9371-73]. The summary shows Sanchez' step "E" removal as occurring by a "special evaluation," the only such reference; the removal of step "D" shows nothing in that column, and is the only one that does not indicate an evaluation or discipline. [Ex 142]. The

City presented no evidence as to the merits of Sanchez' alleged "nonmeritorious performance", in support of its defense that his merit pay would have been removed even if he had been afforded due process.

ARGUMENT

I.
THE CITY WAIVED OR LIMITED ITS RIGHT TO OBJECT TO SOME OF THE ISSUES PRESENTED IN THIS PETITION

A. By Failing to Make a Directed Verdict Motion and to Object to the Jury Instructions and Verdict Forms, the City Waived or Restricted its Available Grounds for Appeal before the Ninth Circuit

The holdings and reasoning of the Ninth Circuit must be viewed in light of its application of the explicit provisions of F.R.Civ.P. 50(b). The City failed to make a motion for directed verdict at the close of the evidence at the damage phase trial, or at any time during that trial, "inartfully" or otherwise, and hence could not move for JNOV nor challenge the

sufficiency of the evidence in the district court or on appeal, see F.R.Civ.P. 50(b); Cabrales v. County of Los Angeles, 864 F.2d 1454, 1459 (9th Cir. 1988); Farley Transp. Co. v. Santa Fe Transp. Co., 786 F.2d 1342, 1345-47 (9th Cir. 1985); nor could it assert any grounds not asserted in a prior motion for directed verdict, see Lowe v. Conlee, 742 F.2d 1140 (8th Cir. 1984). The City was properly limited by the district court and the Ninth Circuit to review of its motion for new trial. See Farley Transp. Co., supra, 786 F.2d at 1347.

The motion for new trial must also be viewed in light of the failure to make a directed verdict motion. When a party fails to make a motion for directed verdict, "the district court's denial of the motion for new trial is reversible only if the record contains no evidence in support of the verdict." Id., 786 F.2d at

1347.

The decision of the Ninth Circuit must also be viewed in light of the City's failure to object to Sanchez' verdict forms, and having failed to propose any verdicts or interrogatories. The Ninth Circuit decision therefore "presumes the existence of factual findings and legal conclusions necessary to support the verdict reached by the jury . . . controlled by the court's instructions to the jury." Bio-Rad Laboratories v. Nicolet Instrument Corp., 739 F.2d 604, 607 (Fed. Cir. 1984). Accord, Velo-Bind, Inc. v. Minn. Mining & Mfg. Co., 647 F.2d 965, 971 (9th Cir. 1981).

The decision of the Ninth Circuit must also be viewed in light of the City's failure to object to the jury instructions given at trial. When a party requests a particular instruction, it "invites any

error contained therein and, absent any objection before the instruction is given, waives appellate review of the correctness of the instruction". See Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1493 (9th Cir. 1986).

The primary instruction given by the district court on constructive discharge -- employing the objective reasonableness test -- was modified from City's Instruction #13, removing the element of liability, per the summary judgment, and the words "sufficiently frequent or bad"; after which the City did not object in its final form as modified by the district court [ER 1069-70; RT 9394-402, 9432-34, 9443-45].

Thus, the Ninth Circuit deemed as waived any objection by the City to any of the above instructions, even if there were previous objections which were not maintained after the district court

informed counsel of the instructions and modifications which it intended. See Benigni v. City of Hemet, 879 F.2d 473 (9th Cir. 1989), cert. denied ___ U.S. ___ (1990).

B. City Waived Right to Assert the Existence of Material Issues of Fact as to Due Process Claim

When the summary judgment motion was before the district court, the City, despite being offered an additional opportunity to present admissible evidence, did not even contend that there were any genuine issues of material fact; and did not offer any declarations or other competent evidence beyond what Sanchez had provided in his motion; and argued that defendants were themselves entitled to judgment as a matter of law because there was a grievance procedure available to him which afforded recourse to the City Manager, and because the City was entitled

as a matter of law to apply amended sec.1008 retroactively.

Since that time, and the failure of that tactical posture, the City has presented a constantly shifting sequence of contentions and arguments. First, the City sought reconsideration based on its belated, selective, self-serving statements about some unwritten city-wide grievance procedure, made at the subsequent trial two years later on other claims, and first made the argument that Sanchez had "waived" his due process rights by not using the grievance procedure. Still, the City did not claim that there were any genuine issues of material fact, still claiming entitlement to judgment.

Some circuits reject such belated proffers outright as "irrelevant". See Frito-Lay, Inc. v. Willoughby, 863 F.2d 1029, 1035-36 (D.C. Cir. 1988); Nissho-Iwai

American Corp.v. Kline, 845 F.2d 1300, 1307 (5th Cir. 1988). The Ninth Circuit applies a somewhat more flexible rule, but still requires some showing that to disregard the normal rule would result in substantial injustice. See Roberts v. Hollandsworth, 582 F.2d 496, 499-500 (9th Cir. 1978). The City offered no explanation to the district court or the Ninth Circuit why it should be excused from enforcement of the normal rule, and both courts[4] therefore declined to find such "substantial injustice."

II.
THE CITY HAS NOT MADE SUFFICIENT ARGUMENTS TO WARRANT A WRIT OF CERTIORARI ON ANY OF THE DUE PROCESS ISSUES RAISED IN THEIR CROSS-PETITION

A. City Charter sec.1008 Gave Sanchez Vested Property Interest in Merit Pay Which Remained After Amendment

In challenging the conclusions below

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[4]. The district court also based its refusal to reconsider on the City's failure to meet the test in Local Rule 7.16.

that Sanchez had a property interest in his merit pay, the City once again is asking to be excused from the normal rules. Never before had the City asked the district court or the Ninth Circuit to determine the property interest issue by exclusive reference to the merit pay resolution [Appendix P], to the exclusion of consideration of sec.1008, with or without the 1978 amendment [Appendices Q & R]. The argument is itself not supported by the authorities cited.

Although the cases refer to property rights being defined by the instrument that creates them, they do not declare that the instrument should not be interpreted against the backdrop of applicable state law. In Hogue v. Clinton, 791 F.2d 1318 (8th Cir. 1986), cited by the City, the court expressly rejected a similar argument. The court rejected an employee

manual provision establishing a "good cause" requirement for termination because of an overriding state law doctrine that employees are terminable "at will" unless there is an employment contract for a fixed term. See id., 791 F.2d at 1323-24.

In evaluating the scope of a property interest, this Court has indicated that one important source is the "rules or understandings that stem from an independent source such as state law [and] that secure certain benefits and support claims of entitlement to those benefits." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Accord, Bishop v. Wood, 426 U.S. 341, 344 (1976) ("sufficiency of claim of entitlement must be decided by reference to state law). Accord, Ostlund v. Bobb, 825 F.2d 1371, 1373 (9th Cir. 1987), cert. denied, ___ U.S. ___ (1988).

This posture by the City is made all

the more absurd by the fact that the City obviously amended sec.1008 in June 1978, to exclude removal of merit pay from the definition of demotions that includes "reductions in pay," precisely to remove it from the protections otherwise afforded to demotions. The protections afforded demotions do not stem from the provisions which prescribe specific procedures that must be followed. Rather, sec.1008 expressly declares that a demotion, like termination or suspensions, must be grounded on a finding of specific misconduct or other good cause[5]. [Appendix Q2-Q3].

The provisions of sec.1008 meet the

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[5]. Sec.1008 enumerates these as follows: "incompetency, inefficiency, dishonesty, misconduct, insubordination, failure to observe department or city rules or the rules and regulations as provided for in this Article, or failure to cooperate reasonably with his superiors or fellow employees." [Appendix Q2-Q3].

required standard for establishment of a property interest in order to trigger constitutional due process requirements. See Olim v. Wakinekona, 461 U.S. 238, 248-51 & n.10 (1983); Hewitt v. Helms, 459 U.S. 460, 471-72 (1983); Board of Curators v. Horowitz, 435 U.S. 78, 92 n.8 (1978). A benefit which is retained by the employee "during good behavior and efficient service" or in the absence of various forms of misconduct establishes a property interest protected by the due process clause. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985). This is precisely the rule correctly applied in the Ninth Circuit. See Clemente v. United States, 766 F.2d 1358, 1364-65 (9th Cir. 1985), cert. denied, 106 S.Ct. 881 (1986) (property interest created by "significant substantive restriction" on decision-making); Goodisman v. Lytle, 724

F.2d 818, 820 (9th Cir. 1984) (same).

The Ninth Circuit was applying basic, black letter law in concluding that sec.1008 provides significant substantive restrictions on the decision-making when a demotion is being considered; and further, that prior to June 1978, those restrictions applied to all reductions in pay, and only after June 1978 was merit pay removed from the ambit of the provision including reductions in pay as demotions.

Prior to this Cross-Petition, defendants never contended that the pre-1978 sec.1008 did not create a property interest in a reduction in pay, including a loss of merit pay. Their sole arguments were that the 1978 amendment could apply retroactively, and even if it did not, then the grievance procedure was sufficient due process. The attempt to graft an entirely new argument, that merit pay was never

embraced by sec.1008, does not even begin to offer a basis for a grant of certiorari.

B. The City's Belated Argument that Legislative Enactments Can Abrogate Vested Property Interests in Employment Is Not a Sufficient Grounds for a Writ of Certiorari

At the time of the summary judgment motion, Sanchez expressly briefed the issue of whether a legislative enactment could abrogate vested contractual property interests. The City responded by simply insisting the contrary position, without citation of any authority whatsoever. On appeal to the Ninth Circuit, the City did not even mention this entire issue. The City cited no error on this issue, and did not cite any authority for the proposition that sec.1008 as amended should or could be applied retroactively.

The Ninth Circuit, in determining the scope of Sanchez' property interest in his merit pay, correctly relied on California

state law, as determined by its highest court, that pay levels in public employment give rise to contractual obligations protected by the prohibition against legislative interference with contracts, citing Olsen v. Cory, 27 Cal.3d 532, 538-39 (1980). Accord, Sonoma County Org. of Public Emp. v. County of Sonoma, 23 Cal.3d 295, 308-309, 314 (1979). The City had not contended otherwise on appeal, and had provided no contrary authority at any time before any court in this matter. This belated raising of the issue, with an even more belated effort to brief the issue, should not be permitted as a basis for issuance of a writ of certiorari.

Moreover, the authorities cited by the City do not even directly address the issue. As above-stated, California law views public employment as giving rise to contractual obligations even if there is no

express contract. Legislative impairment of vested contractual rights in respect to pay may be justified only by a showing of an "emergency justification" to which the enactment is appropriate, with only a temporary removal. See Olson, supra, 27 Cal.3d at 539; Sonoma County Org. of Public Emp., supra, 23 Cal.3d at 305-06[6]. The greater the impairment of the contractual obligation, the higher is the hurdle to be cleared. See Olson, supra, 27 Cal.3d at 539; Sonoma County Org. of Public Emp., supra, 23 Cal.3d at 308-09[7]. A public entity is not free to reduce its contractual obligations merely for a perceived public good. See Sonoma County Org. of Public Emp., supra, 23 Cal.3d at

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[6]. Accord, Home Building and Loan Assn. v. Blaisdell, 290 U.S. 398 (1934).

[7]. Accord, Allied Struc. Steel Co. v. Spannaus, 418 U.S. 234, 245, 250 (1978).

307-08[8].

This situation is therefore quite different from that presented in the several cases cited by the City, in which the courts have permitted prospective reduction in public benefits. In none of the cases cited were there circumstances in which the intended recipients of the benefits involved had a vested contractual claim of entitlement based on the law creating the entitlement. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 432-33 (1982) (no contractual obligation involved; state can enact substantive limitations on causes of action as one aspect of its definition of the property interest, but may not employ a procedural scheme to

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[8]. Accord, United States Trust Co. v. New Jersey, 431 U.S. 1, 26-31 (1977).

destroy a property interest)[9]; Martinez v. California, 444 U.S. 277, 280-82 & n.5 (1980) (no contractual obligation involved; state can enact substantive limitations on causes of action as one aspect of its definition of the property interest); Fleming v. Nestor, 363 U.S. 603, 610-11 (1960) (no contractual obligation involved; no restriction on power to reduce benefits, given provision in original act expressly reserving power to "alter, amend or repeal any provision"); Bi-Metalic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445-46 (1915) (no contractual obligation involved; state has inherent power to increase assessment value of property for tax purposes).

The standard for evaluating

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[9]. None of the other cases cited therein involve a vested contractual obligation being abrogated by legislative action.

legislative abrogation of contractual obligations, especially vested ones, is constitutionally different than when benefits are involved in which the beneficiary has no more than a mere expectancy that the particular benefit level will be maintained. See Allied Structural Steel Co., supra, 418 U.S. at 245, 250 (standard for contractual obligations); United States Trust Co., supra, 431 U.S. at 26-31 (same); Home Building and Loan Assn., supra (same).

The district court and the Ninth Circuit concluded that, under state law, there was no basis to afford retroactive application to the amendment to sec.1008. They did so without any meaningful opposition or briefing from the City -- none at all before the Ninth Circuit. There is no record which would support the City's claim that the courts should have

decided otherwise. A petition before this court is not the time to first begin fashioning a record on which to contest and decide these issues.

Thus, when Sanchez' entitlement to merit pay steps D and E vested prior to June 1978, under applicable state law they could thereafter be revoked only upon specific acts of misconduct. Retroactive removal of such property interests has been deemed, under California law, to be "drastic" for the purpose of analyzing alleged impairment of contracts. See Olson, supra, 27 Cal.3d at 538-40 (elimination of cost-of-living increase is drastic); Sonoma County Org. of Public Emp., 23 Cal.3d at 308-09 (elimination of pay increase for one financial year is severe, permanent and immediate). The court in Olson expressly rejected the claim advanced herein, without competent evidence

on the record, that the impairment could be justified over the difficulty of temporarily having a dual system. Id., 27 Cal.3d at 539-40.

In the absence of the appropriate justification, the applicable provisions were those in the pre-June 1978 version. In fact, the amendment does not purport to be retroactive, and by giving it only prospective application, there is no impairment of contracts and no deficiency in the City's showing.

C. Given that the Substantive Process Made Available to Sanchez Deprived Him of His Property Interest in the Merit Pay, There Is No Basis for a Writ of Certiorari

The City's continuing pre-occupation with the issue of whether its grievance procedure permitted review by the city manager reflects a fundamental misunderstanding of the issue involved. In the City's opening brief before the Ninth

Circuit, the City described the nature of the procedure made available via the grievance procedure.

> "[T]he City's grievance procedure satisfies all requirements for federal procedural due process.
>
> "The procedure for removal of merit pay steps in Santa Ana is set forth in Section 1008 of the City of Santa Ana Charter [as amended in 1978]."

City's Opening Brief, p. 13. The City's brief then quoted from Section 1008 as amended, underscoring the language providing that merit pay, unlike other reductions in pay which require a showing of specific misconduct or other like act, can be removed as a "result of a finding by the appointing authority that the employee's performance does not justify continuance of a level of pay that is dependent on meritorious service . . . ."

It is this language, this application of section 1008 retroactively, which

rendered this so-called city-wide grievance procedure constitutionally inadequate. The procedure is not defective merely because of who the appeal is directed to or who would hear it, but rather because it removes the substantive restrictions on decision-making contained in section 1008 prior to its amendment.

The amended section 1008 [Appendix Q], the merit pay resolution [Appendix P], the SAPD Grievance Procedure [Ex 66:26], and the several memorandums sent to Sanchez instructing him on the grievance procedure all had one thing in common: they would have permitted removal of his merit pay on a bare showing that he no longer was serving meritoriously. The former section 1008 was the only provision which fit the facts herein, and which also assured that the decision would be subjected to the substantive limitations imposed on the

decision-making process for demotions and pay reductions. [Appendix R]. See Olim, supra, 461 U.St at 249-50; Goodsman, supra, 724 F.2d at 820-21.

As mentioned above, this whole issue over the city manager and the so-called unwritten city-wide grievance procedure, first asserted by defendants long after summary judgment had already been issued, has not been properly preserved. The City should not be permitted to so utterly disregard all procedural obligations, as they have done at almost every turn in this matter. In any case, the argument is plainly a diversion from the determinative issue: whether Sanchez' timely and repeated invocation of the procedure which protected his substantive property interest waived his due process rights because the City insisted that it would only recognize invocation of another unwritten procedure

which clearly did not recognize Sanchez' property interest in his merit pay.

The Ninth Circuit herein clearly concluded both that Sanchez was entitled to invoke the only procedure which included the substantive protections to which he was entitled; and further, that a constitutional right cannot be deemed waived under such circumstances of extraordinary ambiguity. In so doing, the Ninth Circuit cited Ostlund, supra. The City remarkably ignores this case and the panel's waiver analysis, even though the Ostlund case also involved the City of Santa Ana. Instead, the City continues to cite Veit v. Heckler, 746 F.2d 508 (9th Cir. 1984), which held such a waiver occurred, but only after first concluding that the employee had no property interest in the grant of a merit pay increase in the first instance. Id., 746 F.2d at 511.

In the final analysis, no administrative appeal of any kind was ever afforded. Sanchez was only offered a procedure bereft of the substantive protections to which he was entitled. Even then, when Sanchez responded in writing, as he was entitled to do, Chief Davis never responded as he was obliged to do. See Ostlund, 825 F.2d at 1373.

III.
THE CITY'S BELATED ASSERTION OF AN ISSUE OF ENTITY LIABILITY THAT IS CONTRARY TO ITS PREVIOUS POSITIONS IS NOT A SUFFICIENT BASIS FOR A WRIT OF CERTIORARI

The City is attempting to turn an issue which only became important enough to be mentioned by the City, for the first time, in its Reply Brief on appeal. The Ninth Circuit declined to address the entity liability issue first raised by the City in its Reply Brief. The City gave the Ninth Circuit panel no grounds or reason to exercise its "discretion," as now urged by

the City, to disregard the rule that is necessary both for fundamental fairness to the opposing party and the orderly process of the court.

Now, the City has asked this Court to conclude that the Ninth Circuit, in declining to consider the belatedly asserted issue, was creating a rule which places it at odds with all other circuits. In other words, the City is taking the view that there is a rule in all other circuits which would have permitted the City to assert this issue at such a late date -- with no authority offered to support that conclusion. This is simply nonsense.

The rule which the City would have adopted may be summed as follows: (1) Sanchez had the burden to demonstrate his entitlement that he was entitled to summary judgment as a matter of law; (2) the City has from time-to-time stated that Sanchez

was not entitled to judgment as a matter of law; therefore, (3) any and all legal issues are implicitly preserved, whether or not ever actually raised, and may be asserted at any time, even after the opposing party has no further opportunity to brief the matter; and (4) in such circumstances, it is an abuse of discretion for the court of appeal to decline to consider the newly raised argument. Not surprisingly, there is not a shred of authority for such a preposterous rule, and no reason for this Court to consider adoption of such a rule.

Moreover, it is a phony issue. Entity liability can be established by showing that the decision-maker's decisions were constrained or guided by official policy whose application by the decision-maker caused the constitutional deprivation. See City of St. Louis v. Praprotnik, 485 U.S.

112, 127 (1988). While the issue of whether a particular official is a policy-making official is a question of law to be determined by the court, see id., 485 U.S. at 142, the questions of whether a particular constitutional deprivation was caused by policy-makers, or whether there is a custom or practice that amounts to policy, are questions of fact to be determined by the jury, see Jett v. Dallas Independent School Dist., 491 U.S. 701, 190 S.Ct. 2702, 2723 (1989). Fact based entity liability can also be shown by proof that the entity ratified or acquiesced in the unlawful conduct and the basis for it. See Praprotnik, supra, 485 U.S. at 127.

There has never been any dispute but that the issue before the district court, and initially before the Ninth Circuit as well, has always been whether the City policy of applying sec.1008 as amended

retroactively violates the due process clause of the constitution by virtue of its removal of substantive protections for vested property interests in merit pay. First, the summary judgment was actually initiated by the City, which had asked the district court to declare that its policy of applying sec.1008 as amended retroactively is constitutional. Second, as quoted above from the City's Opening Brief, it has been the expressly stated position of the City until the Reply Brief that its established city-wide grievance procedure, when applied to loss of merit pay, invoked the provisions of sec.1008 as amended.

At the time of the motion for summary judgment, the City presented no evidence whatsoever, and repeatedly declined to contend that there were any genuine issues of material fact. The posture of the

cross-motions before the district court fully warranted it to conclude that both sides agreed that the issues presented were matters of official policy, with the parties disputing only the legality of the policies. Thus, none of the fact based issues involved were litigated or decided. And even in the numerous motions to reconsider offered by the City, it never suggested that the district court made this error now cited as a basis for Supreme Court review.

There simply is no issue of importance here, nor any conflict between the Ninth Circuit and other circuits or this Court's authorities. Rather, there was a defendant who first litigated exhaustively that its official policy was lawful; then, at the last moment, attempted to reverse field and argue that there was no policy at all. In refusing to permit this, there was no

departure by the Ninth Circuit from any rule or authority.

IV.
THE CITY HAVING FAILED TO PROPERLY MAKE A DIRECTED VERDICT MOTION, IT HAS NO LEGAL BASIS ON WHICH TO SEEK A WRIT OF CERTIORARI ON THE ISSUE OF CONSTRUCTIVE DISCHARGE

Although the City has argued since the end of the trial that constructive discharge was precluded as a matter of law because there was only a "single incident", it never made a motion for directed verdict on that issue. Hence, the Ninth Circuit properly applied its rules for motions notwithstanding the verdict [JNOV] and for new trial when a proper motion under F.R.Civ.P. 50(b) has not been made. See Discussion, supra, at Section I.A. Under those rules, a JNOV is absolutely prohibited and a new trial can be ordered only if there is absolutely no evidence at all on which a jury could conclude that a reasonable person would feel compelled to

resign. See Ford v. Alfaro, 785 F.2d 835, 841-42 (9th Cir. 1986); Watson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987).

Although there is a "general" rule that more than a single incident is required, the test in the Ninth Circuit is a rule of reasonableness, and there is a general rule that such determinations of reasonableness are reserved to the jury. See id., 823 F.2d at 361. The jury instruction in this case, applying the reasonableness test, was presented by the City, which now is therefore precluded from objecting on appeal. See Benigni, supra.

Normally, to overcome the "single incident" rule, the employee need only show "some aggravating factors", with a continuous pattern of discrimination being only one form. Id. In at least one case, the Ninth Circuit upheld four incidents

over a two year period as sufficient to warrant sending the matter to the jury. Id. In Satterwhaite v. Smith, 744 F.2d 1380, 1381-82 (9th Cir. 1984), constructive discharge was found from denial of promotion opportunity coupled with demeaning tasks and occasional racial insults.

In this case, the uncontroverted record reflects a substandard evaluation was received, recommending removal of step "E"; removal of step "E" without compliance with par.58-281 -- i.e. no notice or review by City Manager; retroactive removal of step "E" on date Sanchez left work with a stress reaction; removal of step "D" two weeks after removal of step "E" and while Sanchez was still out on stress leave, for two disciplinary actions about which Sanchez was grieving, again without complying with par.58-281; phrasing removal

of step "D" as "administrative" to avoid notice and hearing procedures; receiving notice of removal of merit steps by receipt of pay check with sum simply removed from pay; relegating Sanchez to SAPD grievance procedure, with written or oral submission to Chief Davis as sole recourse, then ignoring Sanchez' written grievances; refusal to reconsider reinstatement of merit pay after six months, including again refusing to comply with review procedures in par.58-281, requiring notice and review by City Manager. Further, all of this occurred during a stipulated 30% permanent emotional disability, making police work emotionally impossible for Sanchez. Certainly, this constitutes "some evidence" in support of the verdict.

Under Rule 50(b), there is simply no basis on which the Ninth Circuit can be faulted for failing to give the City the

JNOV that it requested. And, given the instruction proposed by the City and given by the district court, and given that there was indisputably "some" evidence from which the jury could have reached its verdict that Sanchez was constructively discharged, there was no legal basis on which the Ninth Circuit could have concluded that a new trial should have been granted by the district court.

CONCLUSION

Sanchez respectfully requests this Court to deny the Cross-Petition for a Writ of Certiorari.

Dated: July 29, 1991

Respectfully submitted,

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